acknowledged that the First Amendment to the United States Constitution protects erotic materials that may have some arguably artistic value from total suppression, but held that a city may legitimately use the content of these materials as the basis for placing them in a different classification from other forms of expression. *Young*, 427 U.S. at 70, 96 S.Ct. at 2452. The basic question is then whether the line drawn by the classification is justified by the city's interest in serving a valid governmental interest, in this case preservation of the character of residential neighborhoods and commercial districts.

Thereafter, this Court relied on *Young* and approved a zoning ordinance of the City of Renton, Washington, that concentrated adult theaters within certain areas of the city. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). *Renton* held that a content-neutral time, place and manner zoning ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. In reaching this conclusion, the Court established the following principles. First, to serve a substantial governmental interest, the ordinance must be concerned with the secondary effects of adult theaters on the surrounding community and not with the content of the adult films themselves. Second, it must not unreasonably limit alternative avenues of communication. Third, an ordinance need not be supported by current studies specifically relating to the city's particular problems. A city is entitled to rely on the experiences of and studies produced by other cities. Fourth, cities may regulate adult businesses by disbursing them as in *Young* or by effectively concentrating them as in *Renton*. Fifth, an ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses if there is no evidence that, at the time the ordinance was enacted, any other adult business was

located in or was contemplating moving into the city. Finally, the First Amendment does not require that a city guarantee commercially viable sites within its boundaries for an adult business to operate. The business must fend for itself in the real estate market on equal footing with other prospective purchasers and lessees. These legal standards are clear, not subject to misconstruction, and have not been violated by the zoning ordinance of the City of Kenner.

A. LIMITING LOCATIONS TO INDUSTRIAL DISTRICTS

Because the City of Kenner's ordinance is not aimed at the content of the material Petitioner displays, sells and exhibits, but rather at the secondary effects of its business on the surrounding community, the limitation of adult bookstores to Light or Heavy Industrial districts achieves the legitimate governmental interest stated by the City of Kenner as the Purpose of its ordinance (p. A-30, Petition for Writ of *Certiorari*). Under *Renton* and *Young*, Kenner is entitled to combat the undesirable secondary effects of businesses that purvey sexually explicit materials by zoning ordinances designed to preserve the quality of urban life.

In order to achieve this goal, adult use businesses had to be limited to Light or Heavy Industrial districts in the City of Kenner. A review of the Kenner zoning map demonstrates that Special Industrial districts are within 1000 feet of residential districts and are unsuitable for adult businesses because of that proximity. The limitation, however, does not deny adult businesses the opportunity to open and operate within other areas in the City.

Moreover, based on the character of adult book/video

stores, location is not essential to such a business. The uncontradicted testimony of the City of Kenner's expert is that location, visibility, and access are of little consequence to adult businesses. Because users of adult products will find those products regardless of location, any infringement of those users' First Amendment right to partake of obscene materials is minimal. The message will reach those who want to hear it.

Finally, because of the unique configuration of the zoning districts of the City of Kenner, the ordinance is as narrowly tailored as is practical. All Special Industrial districts are within 1000 feet of commercial or residential districts. To allow location of adult businesses in Special Industrial districts would be contrary to the the purpose of the ordinance of protecting commercial and residential districts from the secondary effects of adult businesses. The holdings below that the ordinance was not substantially broader than necessary were not erroneous on the facts.

B. AMORTIZATION OF NON-CONFORMING USES

The jurisprudence, as conceded by Petitioner, approves amortization provisions. As long as the amortization period gives a business an opportunity to relocate and to recoup its investment, the requirement is validated. The City of Kenner allowed a year for Petitioner to relocate and/or close its adult business, and this time period has been sanctioned by the jurisprudence. It was operation of the Airline Bookstore in a Special Industrial district that promoted the City of Kenner to enact the zoning amendment at issue. The location in which Petitioner's bookstore existed is admittedly within 1000 feet of residential areas, the protection of which was one of the primary concerns prompting enactment of the statute. Furthermore, all

possible locations in Kenner's Special Industrial districts are within 1000 feet of residential or commercial areas. Thus, the requirement that the bookstore operate in a Light or Heavy Industrial district is not substantially broader than the City of Kenner's goal to control the secondary effects of adult use stores, on residences, other retail establishments, churches, schools, and child-oriented facilities. The legal standards are clear, and the Kenner Ordinance appropriately conforms.

C. CLARIFICATION OF TEST FOR ZONING ORDINANCE THAT EVIDENCE IS RELEVANT TO THE PROBLEM THAT THE CITY ADDRESSES

Petitioner suggests two things in this section. First, it asks this Court to establish a fixed standard against which to measure the amount of sexually explicit inventory a business must have in order to be included in the definition of an adult book/video store. However, the facts do not raise the issue. It was stipulated that petitioner's entire inventory consists of sexually explicit materials and objects available to adults only.

Petitioner also suggests that this Court should establish guidelines as to the types of study a city must undertake of existing adult businesses in order to support a zoning change such as that enacted by the City of Kenner. What Petitioner actually seeks is a reversal of this Court's prior holdings that the First Amendment does not require a city, before enacting such ordinances, to conduct new studies or produce evidence independent of that already generated by other cities. *City of Renton*, 475 U.S. at 51, 106 S.Ct. at 931. In making this argument, Petitioner concedes that Kenner's study satisfied the *Renton* requirement that so long as whatever evidence a city relies

on is reasonably believed to be relevant to the problem the particular city addresses, the requirements of the First Amendment are satisfied.

Moreover, because each city has a different character, and their commercial, industrial, and residential areas have different configurations and relationships to each other, it would be impossible to set out standards that are strictly applicable to all cities. All that is actually necessary is what is presently required. A city must determine the secondary effects of adult oriented businesses on surrounding areas and apply the results to its individual configuration. No reason has been suggested upon which to conclude that secondary effects of adult use businesses on residential and commercial property vary from city to city. In sum, all that can practically be required, and all that *City of Renton* requires, is that a city identify secondary effects and the relevance of those effects on its particular situation.

In discharging its *City of Renton* obligations, the City of Kenner identified secondary effects of adult businesses, found that its Special Industrial districts are within 1000 feet of residential districts, and concluded that location of adult businesses in Special Industrial districts was incompatible with the Purpose of its zoning ordinance. Within the city limits of Kenner, Heavy and Light Industrial districts provided the only locations for adult book/video stores that are not intrusive on commercial and residential districts.

D. COMBINED DISTANCE REGULATIONS AND RESTRICTIVE ZONING

This Court has approved both types of zoning requirements, sanctioning disbursement and concentration

of adult businesses within a city. Petitioner has not shown that restriction to industrial zones, separation of uses, and/or disbursement improperly limits alternative avenues of communication. Each zoning ordinance is peculiar to a city, and review of the ordinance can only be undertaken on a case-by-case basis. This Court clearly held in *Renton* that the First Amendment requires only that a city refrain from effectively denying adult business owners and operators a reasonable opportunity to open and operate within the city. Cases have sanctioned restriction of such businesses to land areas ranging from three to five percent of a city's total area, a criteria satisfied by the City of Kenner. Petitioner fails to make an argument on the facts of this case that establishes a clear violation of the dictates of this Court regarding regulation and restrictive zoning.

E. EVIDENCE RELEVANT TO THE PROBLEM THE CITY ADDRESSES

In this subsection and Point V of the Petition for Writ of *Certiorari* this Court is asked to establish guidelines that would require a city wishing to enact a zoning ordinance affecting adult use businesses to perform specific studies of the location of existing adult use businesses and their secondary effects to justify the ordinance. Petitioner's request is unworkable in reality and would render a city impotent to pass any time, place and manner limitations on adult businesses. In effect, such guidelines would prohibit a city, such as Renton, Washington, from enacting an ordinance controlling adult use businesses until such a business is established. In addition, the business would have to operate in a location long enough for secondary effects to be inflicted upon the surrounding areas. This concept of limiting enactment of zoning regulations would prohibit a city from planning for the

future and avoiding future problems. Moreover, adult use establishments would then have a complaint, based on a requirement to relocate, of the nature Petitioner has made.

What Petitioner suggests is also contrary to this Court's *Renton* requirements. The legal standards established by this Court must be, and have been, styled so that a city can enact zoning ordinances which apply to current problems as well as permit future planning. The City of Kenner relied on studies made by other cities: Boston, Massachusetts; Little Rock, Arkansas; Salt Lake City, Utah; and Huntington, West Virginia. The City also considered the importance of the location of an adult bookstore on one of its main thoroughfares. The record demonstrates that the City relied on its study before designing its ordinance and has not engaged in "post-hoc" justification. The City of Kenner drafted this ordinance to best suit its size, configuration, and the purposes of its Comprehensive Zoning Ordinance. Kenner's use of the studies from other cities revealed that action was required to achieve the purposes of preventing crime, protecting retail trade, maintaining property values, and protecting the quality of the various neighborhoods while, at the same time, not suppressing the expression of unpopular views.

II
THE FACTUAL BASIS FOR THE RULING THAT ANY AVAILABLE SITES FOR AN ADULT BOOKSTORE MEETS THE TEST FOR ALTERNATIVE AVENUES OF COMMUNICATION IS CONSISTENT WITH STANDARDS EXTABLISHED BY *RENTON* AND *YOUNG*

PETITIONER'S POINTS II AND III

Petitioner complains of the District Court's ruling

that "any available sites seems to meet the current test for alternative avenues of communication." Then, without explaining why this conclusion is an incorrect interpretation of *Renton* and *Young*, Petitioner sets out five factors which should be present to meet the test for alternative areas of communication.

Respondents submit that Petitioner seeks to establish bright line principles and multi-factored rules for an issue which is fact-sensitive and better determined on a case-by-case basis. In *City of Renton*, this Court concluded:

> [T]he First Amendment requires *only* that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . . *City of Renton*, 475 U.S. at 54, 106 S.Ct. at 932. (Emphasis added).

Petitioner has stipulated that there are at least four available areas in the City of Kenner in which to relocate. This availability of "areas" satisfies the requirement that Petitioner be given a "reasonable opportunity to open and operate an adult [bookstore] within the City [of Kenner]."

Petitioner infers that what is actually meant by the term "any available sites" is any site which meets the criteria of the ordinance, regardless of physical or legal impossibility to actual location of an adult business on it. Such an inference may not properly be drawn from the evidence in this case, and is not consistent with the Fifth Circuit's position as evidenced by its recent decision in *Woodall v. City of El Paso*, 950 F.2d 255 (5th Cir. 1992).[1]

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[1] It should be noted that Judge Reavley, who was one of the three judges on the Fifth Circuit panel in the present case, also participated in the *Woodall* decision.

In *Woodall*, the court concluded that "land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there." *Id.* at 263.[2] Thus, it is clear the Fifth Circuit's affirmance of the District Court's conclusion that there were available sites for petitioner to relocate was based on the fact the available sites were not burdened with legal or physical restrictions which would preclude relocation.

No evidence was introduced by Petitioner to show that those areas which its own expert considers available do not offer a reasonable opportunity to open and operate an adult bookstore. In fact, this argument was not raised below and is apparently a twelfth hour attempt to question what has been stipulated all along: the availability of alternative locations for Petitioner to operate a bookstore. These alternative available sites in four areas meet the criteria established by this Court in *Young* and *Renton*.

Even if this Court were to disapprove the district court's use of the term "any available sites," the stipulated facts clearly demonstrate that the ordinance passes First Amendment scrutiny. Within the four available areas admitted by Petitioner to exist are buildings which are now available which could be converted to adult book/video store use, and which are accessible from Veterans Boulevard and/or Williams Boulevard, two of Kenner's three main thoroughfares.[3] "That [Petitioner] must fend

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[2] See also, per curiam, on Petition For Rehearing and Suggestion For Rehearing En Banc, *Woodall v. City of El Paso*, United States Court of Appeals, Fifth Circuit, No. 90-8269, April 21, 1992.

[3] In fact, after its Motion to Stay Enforcement of the Ordinance was denied by the Fifth Circuit, LaGrange moved to a site within one of these four areas.

for [itself] in the real estate market on an equal footing with other perspective purchasers and lessees does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932. In fact, because there are no other adult bookstores operating in the City of Kenner to compete for sites in the four available areas, the City of Kenner, by passing the ordinance, has not "effectively den[ied Petitioner] a reasonable opportunity to open and operate an adult [bookstore] within the City."

Petitioner also asserts that there is a conflict between the Fifth Circuit and other federal circuits, as well as several state courts, regarding the meaning and application of the *Renton* requirement that reasonable alternative avenues of communication be provided. Petitioner relies on specific facts in these post-*Renton* cases to assert that these decisions are in conflict with the Fifth Circuit. However, as previously suggested, each case is fact sensitive and must be decided on its own merits. Any attempt to extrapolate figures from case to case and draw a bright line whereby First Amendment principles are crossed should be rejected. This Court need only decide that on the facts of this case there was no error in the holdings that the Kenner ordinance provides reasonable alternative avenues of communication. There is no such error on the facts, and the Kenner ordinance was properly upheld as a constitutionally valid, content-neutral time, place and manner regulation.

CONCLUSION

On the stipulated facts of this case, the courts below did not err in their interpretation of established legal standards applicable to zoning ordinances addressing the secondary effects of businesses distributing sexual materials or in application of those standards to uphold

City of Kenner Ordinance No. 6333. As a content-neutral time, plan and manner zoning regulation, the ordinance was designed to serve a properly supported substantial governmental interest in a narrowly tailored manner which did not unreasonably limit alternative avenues of communication to Petitioner's adult bookstore. The Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the Petition for Writ of *Certiorari* filed on behalf of Petitioner, LaGrange Trading Company, d/b/a Airline Bookstore, was received on May 11, 1992, and that the Opposition to Petition for Writ of *Certiorari* on behalf of Respondents, Nicky Nicolosi, Aaron Broussard, and the City of Kenner, Louisiana, is being filed and served by U.S. mail, first class postage prepaid, upon counsel of record for Petitioner, LaGrange Trading Company, d/b/a Airline Bookstore, through its attorney of record, Frierson M. Graves, Jr., Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 2000 First Tennessee Building, Memphis, Tennessee, 38103, this 9th day of June, 1992.